

Religion, Conscience, and the Case for Accommodation

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I. INTRODUCTION

I do not believe that religion is an obsolete constitutional category. But I do believe that the holdings in *United States v. Seeger*¹ and *Welsh v. United States*,² the Vietnam-era draft cases that extended conscientious objector status to individuals invoking nonreligious claims, were correct. Can I consistently embrace both propositions?

I think I can. My argument, in brief, is that religion is indeed special. But when we understand what it is about religion that warrants both distinctive privileges and distinctive burdens, we will see that some

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1. *United States v. Seeger*, 380 U.S. 163, 164–66 (1965).

2. *Welsh v. United States*, 398 U.S. 33, 343–44 (1970) (plurality opinion).

other systems of belief track these features of religion closely enough to warrant comparable treatment. Still, religion is the exemplary core of the genus of such beliefs.

II. TWO THRESHOLD OBJECTIONS

A. *Religion Is Not an Obsolete Constitutional Category Because It Is Not a Category*

There is no agreed-on definition of religion for either scholarly or legal purposes. Religion is used as a term of distinction, but the quest for a bright-line definition has come up empty. As the Court declared in *Reynolds v. United States*, “The word ‘religion’ is not defined in the Constitution.”³

The growth of religious pluralism in America has only compounded the difficulty. The conventional approach invokes criteria such as belief in a single “Supreme Being,”⁴ but bodies of belief that most people would regard as religions are nontheistic or polytheistic. But if conceptual fuzziness were a killer objection to religion as a constitutional category, we would have to abandon a great deal of the document. It turns out that there is not even an uncontested definition of “recess.”⁵ If the debate over when life begins deepens, one could even imagine a legal disagreement about whether the constitutional age requirements for specific offices have been met.

Besides, there is more than one way to distinguish between X and not-X. Sometimes we can specify necessary and sufficient criteria. At other times, case-by-case determinations gradually clarify conceptual perimeters. Constitutional concepts may be more like Wittgensteinian families than mathematical classes. “Religion” may resemble Justice Stewart’s famous remark about pornography.⁶ But there is such a thing as pornography, and we all know it. Or—to elevate the conversation—recall Saint Augustine’s even more famous reflection on time: “What, then, is time? If no one asks me, I know; but, if I want to explain it to a questioner, I do not know.”⁷ It does not follow that time is a hopelessly indeterminate concept.

3. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

4. *Seeger*, 380 U.S. at 165 (quoting 50 U.S.C. app. § 456(j) (1958)).

5. *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 233–34 (3d Cir. 2013) (noting that there is an absence of a connection between “the Recess of the Senate” and a definite length of time); *Canning v. NLRB*, 705 F.3d 490, 503–05 (D.C. Cir. 2013) (noting the same).

6. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

7. SAINT AUGUSTINE, *CONFESSIONS* 343 (Vernon J. Bourke trans., Fathers of the Church, Inc. 1953) (n.d.).

*B. It Does Not Matter Whether Religion Is an Obsolete
Constitutional Category or Not*

This objection is shorthand for the majority decision in *Employment Division v. Smith*: If a law is facially neutral and promotes a valid public purpose, the burden it may impose on the free exercise of religion is not a reason to set aside the law and does not require special exemptions or accommodations for religious individuals or groups.⁸ Many progressive legal academics have endorsed this holding, despite the identity of its author and the decidedly Hobbesian thrust of his argument.

There are two responses to this objection. The first is brief: Even if we were to accept the holding in *Smith* (I do not), it would not follow that religion is on all fours with other forms of belief for Establishment Clause purposes. We all agree, I take it, that Congress may not establish a religion, either by giving it a preferred institutional position or by using its distinctive doctrines as the basis for legislation.⁹ But odd as it may sound, there is nothing in the Constitution to prevent the federal government from establishing a secular doctrine. For example, it can create and fund an economic board whose membership is restricted to Keynesians (or supply-siders), and it can base legislation on its preferred economic theory, even though many experts and ordinary citizens reject it. Moreover, government regularly endorses secular moral propositions—“If you work full-time, you should not be poor”—and employs them as the basis of its policies. So however we construe these categories, the distinction between religious and nonreligious beliefs is doing real work.

The second response confronts *Smith* directly with a hypothetical drawn from the least successful constitutional innovation in our history. The Eighteenth Amendment went into effect on January 16, 1920.¹⁰ It was widely understood that without the concurrent legislation authorized in Section 2, the general prohibition on the manufacture, sale, and transportation of alcoholic beverages would be too vague to enforce.¹¹ On October 28, 1919, the National Prohibition Act (popularly known as the Volstead Act),

8. See *Emp’t Div. v. Smith*, 494 U.S. 872, 878–82 (1990).

9. See U.S. CONST. amend. I.

10. See ARTHUR W. BLAKEMORE, NATIONAL PROHIBITION: THE VOLSTEAD ACT ANNOTATED AND DIGEST OF NATIONAL AND STATE PROHIBITION DECISIONS 7 (2d ed. 1925). It was ratified on January 16, 1919. *Id.*

11. See DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 13 (Kent State Univ. Press 2d ed. 2000) (1979).

which created the legal definition of “intoxicating liquor” and specified penalties for producing it,¹² passed over President Wilson’s veto and stood as the law of the land until 1933.¹³

The Volstead Act created a number of exemptions to the prohibition regime, of which two are especially noteworthy. First, the Act allowed physicians to prescribe liquor to individuals for medicinal purposes and to employ it pursuant to treatment for alcoholism in certified treatment programs.¹⁴ Second, the Act stated that nothing it contained should be construed as applying to “wine for sacramental purposes, or like religious rites,” and it permitted the sale or transfer of wine to rabbis, ministers, priests, and officers duly authorized by any church or congregation.¹⁵

Suppose the Act had not exempted physicians. The omission would have been subject to criticism on policy grounds, but no one would have suggested that it ran afoul of constitutional norms. But what if the Act had failed to exempt wine for sacramental purposes?

The use of sacramental wine lies at the heart of more than one religion. The Code of Canon Law of the Catholic Church prescribes that “[t]he most holy eucharistic sacrifice must be offered with bread and with wine in which a little water must be mixed.”¹⁶ For its part, Jewish law (*halacha*) commands the drinking of wine during the Passover Seder, specifying not only the famous four cups but also a minimum quantity to be consumed.¹⁷ (As even neophyte Seder attenders soon observe, there is no maximum.) Comprehensive prohibition without exemptions would have prevented faithful Jews and Catholics from behaving as their religion requires.

I see no principled distinction between this Prohibition-era hypothetical and a stylized account of the issue in *Smith*. If *Smith* is rightly decided, then there would be no constitutional bar to a system of comprehensive prohibition. After all, such a system would pursue a valid public purpose in a facially neutral way.

Can this be the right result? If the Free Exercise Clause means anything, surely it protects the right of religious individuals and groups to practice the core rituals of their faith. The Constitution’s presumption in favor of

12. See National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305, 305–09 (1919), *repealed by* Liquor Law Repeal and Enforcement Act, ch. 740, § 1, Pub. L. No. 74-347, 49 Stat. 872 (1935); ARCHIBALD DOUGLAS DABNEY, *LIQUOR PROHIBITION* 9, 11 (1920).

13. See KYVIG, *supra* note 11, at 13, 182; *Historical Highlights: The Volstead Act*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Historical-Highlights/1901-1950/The-Volstead-Act/> (last visited Oct. 31, 2014).

14. See DABNEY, *supra* note 12, at 16, 142.

15. See *id.* at 18–19.

16. 1983 Code c.924, §1, *reprinted in* NEW COMMENTARY ON THE CODE OF CANON LAW 1116 (John P. Beal et al. eds., 2000).

17. See IRVING GREENBERG, *THE JEWISH WAY: LIVING THE HOLIDAYS* 51, 56 (1988).

free exercise is designed to reduce to an avoidable minimum the circumstances in which such clashes are resolved in favor of the state.

There are such circumstances, of course. No one doubted, or doubts, the propriety of certain “time, place, and manner restrictions”: free exercise does not entail the right to conduct a loud revival meeting in a residential neighborhood at 2:00 AM.¹⁸ In such circumstances, religious noise is on all fours with secular sounds. No one would seriously argue that the claims of religious free exercise extend to human sacrifice (as opposed to animal sacrifice, which does enjoy First Amendment protection).¹⁹ There are some bedrock civil concerns that the law may enforce, regardless of their effects on particular religions.

But surely there is a distinction between such concerns and the more typical objects of legislation, which were thought not to be so fundamental as to outweigh religious free exercise. Despite the obvious importance of communal self-defense, many colonies exempted Quakers from serving in battles against the French and Native Americans, an exemption that some colonies continued during the Revolutionary War.²⁰ Madison and the members of the first Congress were well aware of this.²¹ Although some contend that the drafters of the First Amendment did not contemplate, and would have opposed, the regime of religious accommodation codified in *Sherbert v. Verner*,²² many legal historians disagree.²³

The bottom line is this: If the Free Exercise Clause means anything, it must be interpreted as establishing a presumption in favor of certain practices and imposing a burden the state must meet if it seeks to regulate or prohibit them. This principle does not tell us whether the presumption is limited to religion or applies more widely. Nor does it tell us whether

18. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

19. See *Jones v. Butz*, 374 F. Supp. 1284, 1294 (S.D.N.Y. 1974) (holding that the Humane Slaughter Act did not violate the First Amendment because Congress can create religious exemptions without establishing a particular religion nor inhibiting the exercise of other religions).

20. See John Whiteclay Chambers II, *Conscientious Objectors and the American*

SACRED TO SECULAR RESISTANCE 23, 26–28 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993).

21. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1454 (1990).

22. 374 U.S. 398, 410 (1963).

23. See McConnell, *supra* note 21, at 1449–54.

anything like the Free Exercise Clause should be in a constitution that meets the best normative standards.

III. RELIGION AND AUTHORITY

Smith fails as a plausible interpretation of the constitution we have, but it could point toward the constitution we ought to have. Does it?

At its starkest, religion and politics confront us with competing authorities and conflicting commands. As James Madison said in the famous *Memorial and Remonstrance Against Religious Assessments*: “It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to Him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society.”²⁴ Many believers consider themselves to be subject to two authorities—one human, the other divine. In cases of conflict between them, the faithful believe that God’s authority is paramount. What is to be done?

Speaking broadly and schematically, there are three possible relations between political and religious authority. First, political authority may be comprehensively dominant over religion, which is seen as serving state power (and for this reason is often called “civil”). One of the many difficulties with this position is that it subordinates the religious content of faith—its theological claims—to its civil consequences. No believer can be comfortable with this functionalist reduction of faith.

Second, and conversely, religious authority may coincide with, or comprehensively dominate, political authority, yielding some version of theocracy. This stance invariably represents the dominance of a particular faith at the expense of all others. Whatever may be the case for homogeneous communities espousing a single faith, the theocratic impulse creates insuperable difficulties for diverse societies with multiple faith communities. Each of the “Abrahamic” faiths contains theocratic strains, but in the encounter with modernity, each has found sufficient inner resources to accept nontheocratic politics.

Third, political and religious authority may coexist without either enjoying a comprehensive dominance. One version of this position seeks to divide social life into different spheres, dominated by either politics or faith.²⁵ (Maxims such as “Render unto Caesar the things that are Caesar’s . . .” provide the basis for such an understanding.) It is hard to come by such neat surgical divisions, however. More typically, the

24. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), available at <http://billofrights.institute.org/wp-content/uploads/2011/12/MemorialofRemonstrance.pdf>.

25. See NICHOLAS WOLTERSTORFF, *THE MIGHTY AND THE ALMIGHTY* 134 (2012).

coexistence model implies overlapping and conflicting claims, generating the need for both theoretical clarification and legal adjudication.

Almost by definition, liberal democracies must embrace some version of the coexistence model. In the United States, the jurisprudence of the religion clauses of the First Amendment has helped define the terms of this coexistence. But this jurisprudence is unsettled, in no small measure because many academics and not a few judges have a hard time squaring the words of the Constitution with their understanding of what liberal democratic morality requires. Laurence Tribe argues that “[t]he Framers . . . clearly envisioned religion as something special; they enacted that vision into law by guaranteeing the free exercise of *religion* but not, say, of philosophy or science.”²⁶ Christopher Eisgruber and Lawrence Sager counter that “[t]o single out one of the ways that persons come to understand what is important in life, and grant those who choose that way a license to disregard legal norms that the rest of us are obliged to obey, is to defeat rather than fulfill our commitment to toleration.”²⁷

Singling out religion for special treatment, many scholars fear, violates neutrality among “conceptions of the good” and treats nonreligious citizens unequally—hence unfairly. In the course of a public debate with Michael McConnell, Noah Feldman put it this way:

There is no doubt that James Madison . . . thought that religion was special. But I do not think that we can order our constitutional affairs today in just the way James Madison wanted us to. I am not going to be speaking in the terms of what the original meaning of the Constitution was, but rather in terms of what ought to be the most attractive justification for what our constitutional institutions should do today.²⁸

Feldman deserves credit for acknowledging a distinction between the positive and normative Constitution—between the document as it is and as he would like it to be. (Would that more of today’s legal theorists were as scrupulous.) Morality is one thing, the positive Constitution another. A provision of the Constitution can contradict our preferred moral view

26. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1189 (2d ed. 1988).

27. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1315 (1994).

28. RELIGIOUS FREEDOM PROJECT, GEORGETOWN UNIV., REPORT OF THE GEORGETOWN SYMPOSIUM ON WHAT’S SO SPECIAL ABOUT RELIGIOUS FREEDOM? 16 (2011) [hereinafter GEORGETOWN SYMPOSIUM REPORT], available at <http://repository.berkleycenter.georgetown.edu/120901RFPWhatsSoSpecialReligiousFreedomSymposiumReport.pdf>.

and be legally binding nonetheless. Lincoln said that slavery was wrong if anything is wrong, but he never claimed that the Constitution could be read so as to prohibit it.²⁹

Aspects of the Constitution could conflict as well with philosophical arguments we take to be true. But a philosophical question is not the same as a constitutional question, and when conflicts arise, unfettered reason must give way to the law. Jeremy Bentham famously declared that “[n]atural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.”³⁰ He might well be right. But that is not what the Framers thought, and it is their thought that governs us, unless and until we the people decide to discard or emend it.

Still, Feldman’s argument mirrors the widespread tendency to parse normative attractiveness as justice or fairness, understood in egalitarian terms. There is an alternative approach that can be traced to James Madison and, farther back, to the political thought of early modernity. I agree with Steven Smith’s account of Madison—that Madison saw religious liberty not as a government-granted privilege of immunity or as an interest to be balanced against others.³¹ Rather, religion was a domain “wholly exempt from [government’s] cognizance.”³² This is the core instance of what Smith calls the “logic of jurisdiction” as opposed to the logic of justice, and it is central to liberal democracy, properly understood.³³

We need to think harder about this familiar phrase. The noun points to a particular *structure* of politics in which decisions are made, directly or indirectly, by the people themselves, and more broadly, to an understanding of politics in which all legitimate power flows from the people. The adjective by contrast, points to a particular understanding of the *scope* of politics in which the domain of legitimate political decisionmaking is seen as inherently limited. The antonym of “liberal” is not “conservative” but rather “total.” Liberal governance acknowledges that some spheres of human life lie wholly or partly outside the purview of political power.

29. Randy Russell, *Lincoln Concerning Slavery*, LINCOLN & SLAVERY, <http://lincolnandslavery.com/ljsom/document/complete-lincoln-concerning-slavery-article.html> (last visited Nov. 1, 2014).

30. Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, in ‘NONSENSE UPON STILTS’: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987).

31. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 161 (1991).

32. *Id.* (quoting MADISON, *supra* note 24).

33. See STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 171 (2014).

Why might one think that to be the case? In *Memorial and Remonstrance Against Religious Assessments*, Madison asserts that it is an “arrogant pretension” to consider the civil magistrate a “competent judge of [r]eligious [t]ruth.”³⁴ Where government does not have the capacity to make a well-grounded choice between competing claims, McConnell says, its jurisdiction ends.³⁵ He contrasts religion to environmentalism: “If the civil magistrate were not a competent judge of the truth of environmental claims, I do not think we could have an Environmental Protection Agency, debates in Congress about environmental legislation, or even have public schools encouraging an environmental ethic for our children.”³⁶

This seems right to me, as far as it goes. But how far is that? In the first place, when religion makes empirical claims that overlap with the natural sciences, government reenters the scene as a competent judge. That is why teaching evolution in public schools is a matter of legitimate political debate. Second, government is competent to judge the actions that religious beliefs entail, even when it is not competent to assess the truth of those beliefs. A neo-Aztec cult preaching the obligation of virgin sacrifice would not be allowed the free exercise of its creed, and rightly not. This is a dramatic instance of a larger category John Locke termed civil concerns touching on the peace, security, and wellbeing of the political community.

A third issue challenges not the immunity of religion belief but rather its distinctiveness. Simply put, there is an epistemological continuum between the Resurrection and environmentalism, not a stark choice. Although philosophers pride themselves on reasoned arguments, it verges on fanciful to posit government’s competence to adjudicate metaphysical debates that have vexed philosophy for millennia.

Nor is it the case that unlike religion, philosophical worldviews do not give rise to free exercise claims. Feldman says that “[r]eligion should not get any less protection than the framers gave it, but those same protections should similarly be given to sincerely and conscientiously-held philosophical beliefs,”³⁷ to which McConnell retorts, “I cannot think of a single instance in which anyone has ever brought a claim in any court of the United States saying, ‘My belief system is philosophy and somehow

34. MADISON, *supra* note 24.

35. See GEORGETOWN SYMPOSIUM REPORT, *supra* note 28, at 15, 20 (quoting Michael McConnell).

36. *Id.* at 15 (quoting Michael McConnell).

37. *Id.* at 17 (quoting Noah Feldman).

the state is . . . interfering with my free exercise of philosophy.’’³⁸ But McConnell is mistaken: the plaintiffs in the Vietnam-era draft cases were advancing just such claims. We cannot evade the challenge these cases pose to the distinctiveness of religion and thus to a pillar of our constitutional order.

IV. THE JURISPRUDENCE OF ACCOMMODATION

To frame the issue, I begin with two cases from the 1940s. In *Minersville School District v. Gobitis*, the Supreme Court decided against Jehovah’s Witnesses who sought to have their children exempted from the daily pledge of allegiance to the flag on the grounds that this exercise amounted to a form of idolatry strictly forbidden by their faith.³⁹ Three years later, in *West Virginia State Board of Education v. Barnette*, the Court reversed itself.⁴⁰ In the peroration of the majority’s decision, Justice Robert Jackson declared that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁴¹ Therefore, he concluded, “the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitation on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”⁴²

As Steven Smith has argued, this much-admired passage falls apart under scrutiny.⁴³ Every political community rests on certain orthodoxies that officials endorse and promulgate. And despite the Establishment Clause, some necessary orthodoxies may conflict with the teachings of some religions. Jackson would have done better to focus more narrowly on forced profession, the prohibition of which would have sufficed to resolve the salute and pledge issues. There is a strong presumption against compelling individuals to make affirmations contrary to their convictions. This does not mean that compulsory speech is always wrong; courts and legislatures may rightly compel unwilling witnesses to give testimony and may rightly punish any failure to do so that does not invoke a well-established principle of immunity, such as the bar against coerced self-incrimination. Even here, the point of the compulsion is to induce

38. *Id.* (quoting Michael McConnell).

39. *See Minersville School Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).

40. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

41. *Id.*

42. *Id.*

43. *See SMITH, supra* note 33, at 137.

individuals to tell the truth as they see it, not to betray their innermost convictions in the name of a state-administered orthodoxy.

For current purposes, the key point is this: although *Gobitis* and *Barnette* addressed the tension between public law and religious conscience, the majority's decision in *Barnette* cast a wider net. Although Justice Jackson's "sphere of intellect and spirit" included religion, it encompassed much else besides.⁴⁴ Does the expansion of protected liberty to include secular convictions make sense?

We see this issue playing out in a fascinating way in the evolving jurisprudence of conscience-based exemptions from the military draft. Section 6(j) of the WWII-era Universal Military Training and Service Act made exemptions available to those who were conscientiously opposed to military service by reason of "religious training and belief."⁴⁵ The required religious conviction was defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."⁴⁶

In the case of *United States v. Seeger*, however, the Court broadened the definition of religion by interpreting the statute to include a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."⁴⁷

This proposition, which the Court labeled a "test," raised some obvious questions. It was by no means clear, for example, what it means for a belief to occupy a "place" akin to that filled by the deity as conventionally construed.⁴⁸ One might have in mind the status of that belief at the peak of a hierarchy of beliefs; or the role of faith in affirming that belief; or its epistemological imperviousness to confirmation and refutation; or the strength of conviction with which the belief was held. The Court rested content with a vague spatial metaphor. The ambiguity remained and reemerged in later cases.

44. *Barnette*, 319 U.S. at 642.

45. Selective Service Act of 1948, Pub. L. No. 80-759, § 6(j), 62 Stat. 604, 613 (1948) (renamed the Universal Military Training and Service Act by Pub. L. No. 82-51, § 1, 65 Stat. 75 (1951), codified as amended at 50 U.S.C. app. § 456(j) (1958)).

46. *Id.*

47. *United States v. Seeger*, 380 U.S. 163, 176 (1965).

48. *See id.*

Although the bulk of the opinion addressed issues of statutory construction and legislative history, it is easy to discern an underlying concern that defining religion in the language of traditional monotheism would no longer do justice to the increasing diversity of American religions, which now include Buddhism and Hinduism. The Court also worried about the compatibility between traditional monotheism and contemporary scholarship on the nature of religion, quoting liberally from theologians such as Paul Tillich⁴⁹ and John A.T. Robinson.⁵⁰ In a characteristic locution, Tillich propounded a meta-theology in which “the God of both religious and theological language disappears.”⁵¹ But not to worry: “something remains, namely, the seriousness of that doubt in which meaning within meaningless is affirmed.”⁵²

As the Court’s opinion proceeded down this road, however, the line between religion and nonreligion blurred. How could it not? Bishop Robinson said that “we are reaching the point at which the whole conception of a God ‘out there’ . . . is itself becoming more of a hindrance than a help.”⁵³ The Court also quotes David Saville Muzzey, a leader in the Ethical Culture Movement, who announced that

Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men.⁵⁴

The title of Muzzey’s book was *Ethics as a Religion*,⁵⁵ and the Court took him at his word, placing ethical culture within the “broad spectrum of religious beliefs found among us.”⁵⁶ The Court did not pause to ask how it could maintain the statutory distinction between religious and nonreligious objections to military service if an avowed anthropocentric view were classified as religious. Given that the lead plaintiff in the case cited Plato, Aristotle, and Spinoza in support of his stance—“without belief in God,” he said, “except in the remotest sense”—one might have expected the Court to focus on the challenge of preserving the statutory

49. See *id.* at 180 (quoting PAUL TILlich, 2 SYSTEMATIC THEOLOGY 12 (1957)).

50. See *id.* at 181 (quoting JOHN A.T. ROBINSON, HONEST TO GOD 13–16 (1963)).

51. *Id.* at 180 (quoting TILlich, *supra* note 49, at 12).

52. *Id.* (quoting TILlich, *supra* note 49, at 12).

53. *Id.* at 181 (quoting ROBINSON, *supra* note 50, at 15–16).

54. *Id.* at 183 (quoting DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION 95 (1951)).

55. DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION (1951).

56. *Seeger*, 380 U.S. at 183.

distinction.⁵⁷ Instead, it passed by that issue *sub silentio*. But the difficulty remained.

Underlying all these issues, I believe, was a key shift in political culture: many serious thinkers had come to doubt that the distinction between religious and nonreligious belief should be maintained, at least for purposes of exemption from military service. For example, the Court quoted from an article by Columbia Law School's former dean Harlan Fiske Stone, who went on to become Attorney General and then Chief Justice:

All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation.⁵⁸

Stone was not alone in intimating that the core of the matter was not religion but conscience, which could legitimately manifest itself through secular as well as theological convictions.⁵⁹

Near the beginning of its opinion, the Court noted that the plaintiffs had raised two constitutional objections to their denial of conscientious objector status: first, that by discriminating among different forms of religious expression, the denial violated due process; and second, that by discriminating between religious and nonreligious conscientious objectors, the denial violated the Establishment Clause.⁶⁰ Although the *Seeger* Court chose not to reach the second objection,⁶¹ it did not take long for that suppressed question to surface. Just five years later, in *Welsh v. United States*, a Court plurality further broadened the reach of the statute to include explicitly secular beliefs that "play the role of a religion and function as a religion in . . . life."⁶² Thus, draft exemptions could be extended to "those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."⁶³

57. *Id.* at 166.

58. *Id.* at 170 (quoting Harlan Fiske Stone, *The Conscientious Objector*, 21 COLUM. U. Q. 253, 269 (1919)).

59. *See id.* at 169–72.

60. *Id.* at 165.

61. *Id.* at 165–66.

62. *Welsh v. United States*, 398 U.S. 333, 339 (1970) (plurality opinion).

63. *Id.* at 344.

The plurality argued that the Court's holding in *Seeger* covered Welsh's claim.⁶⁴ To sustain this argument, however, it was compelled to reinterpret the *Seeger* test. "What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6(j)," the plurality decision declared, is that "this opposition to war stem from the registrant's moral, ethical, or religious beliefs . . . and that these beliefs be held with the strength of traditional religious convictions."⁶⁵ Following the letter of the statutory language, the *Seeger* Court had labored to expand the definition of religion while preserving some distinction between religious and nonreligious beliefs.⁶⁶ The *Welsh* Court elided that distinction completely.⁶⁷

This interpretive *legerdemain* evoked an acerbic concurrence from Justice Harlan, who had provided the fifth vote for *Seeger*'s expansive reading of conscientious exemption.⁶⁸ Harlan argued in a concurring opinion that the plurality's interpretation of the statutory language was indefensible (as indeed it was).⁶⁹ Nonetheless, he said, the Court could and should save the statute by engaging in an explicit act of reconstruction.⁷⁰ The reason: it would be a violation of both the Establishment and Equal Protection Clauses for Congress to differentiate between religious and nonreligious conscientious objectors.⁷¹ This was the judicial precursor of the Eisgruber/Sager position.⁷²

For their part, the three dissenters argued that although Harlan was right as a matter of statutory construction, he was wrong as a matter of constitutional interpretation.⁷³ "[N]either support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment," they wrote.⁷⁴ But "neutrality," is not self-defining.⁷⁵ "If it is 'favoritism' and not 'neutrality' to exempt religious believers from the draft, is it 'neutrality' and not 'inhibition' of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition?"⁷⁶ It cannot be denied, the

64. *See id.* at 335, 338.

65. *Id.* at 339–40.

66. *Seeger*, 380 U.S. at 173–74.

67. *Welsh*, 398 U.S. at 339–40 (plurality opinion).

68. *See id.* at 344 (Harlan, J., concurring).

69. *See id.* at 345.

70. *See id.* at 345, 361–67.

71. *See id.* at 345, 356–59.

72. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 11, 13, 15, 20 (2007).

73. *See Welsh*, 398 U.S. at 372 (White, J., dissenting).

74. *Id.*

75. *Id.*

76. *Id.*

dissenters concluded, that “the First Amendment itself contains a religious classification.”⁷⁷ That is Tribe’s point exactly.⁷⁸

We have reached the moment of truth. The language of the Constitution unmistakably singles out religion for protection and prohibition.⁷⁹ And “religion,” I have argued, is a term of distinction not coextensive with systems of moral belief. How can these two propositions be consistent with the thesis I advanced at the outset, that the holdings of *Seeger* and *Welsh* (not the decisions) were correct?⁸⁰

Reflecting on how religion functions in constitutional arguments helps answer that question and should incline us to favor a broader view. There are, I suggest, two features of religion that figure centrally in the debate about religiously based exemptions from otherwise valid laws. First, believers understand the requirements of religious beliefs and actions as central rather than peripheral to their identity; and second, they experience these requirements as authoritative commands. Regardless of whether an individual experiences religious requirements as promoting or rather thwarting self-development, their power is compelling. (In this connection, recall the number of Hebrew prophets—starting with Moses—who experience the divine call to prophetic mission as destructive of their prior lives and identities.)

Since the Enlightenment, forms of moral belief have emerged that meet these criteria without invoking a religious basis. Kant’s practical philosophy construed morality as rational freedom and placed our moral capacity, so understood, at the heart of what it means to be human.⁸¹ We are not free to disregard the commands of morality, whatever the costs to ourselves and others.⁸² (Unlike Heidegger and his epigone, the followers of Kant resisted the Nazis.⁸³) In a similar vein, non-Jews who defied the Nazis and risked their lives to save Jews have told researchers that they

77. *Id.*

78. *See supra* note 26 and accompanying text.

79. U.S. CONST. amend. I.

80. *United States v. Seeger*, 380 U.S. 163, 164–66 (1965); *Welsh*, 398 U.S. at 343–44 (plurality opinion).

81. *See* Robert Johnson, *Kant’s Moral Philosophy*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/kant-moral/#Aca> (last updated Apr. 6, 2008).

82. *See id.*

83. *See* VICTOR FARÍAS, HEIDEGGER AND NAZISM 156–69 (Joseph Margolis & Tom Rockmore eds., Paul Burrell & Gabriel R. Ricci trans., Temple Univ. Press 1989) (1987); Keith D. Nunes, *Detentions of Political, Racial, and Religious Persecutees and Dissenters: Asylum and Human Dignity*, 16 N.Y.L. SCH. J. HUM. RTS. 811, 834–35 (2000).

followed the dictates of conscience.⁸⁴ A few invoked religion as the source; most did not.⁸⁵

In modernity, then, some nonreligious individuals and groups come to embrace ensembles of belief and action sharing the features of religion that undergird the case for accommodation. “Here I stand, I can do no other” can be a sincere secular claim. The argument for expanding the perimeter of religious liberty to cover such instances is strong: to the greatest extent possible, like cases should be treated alike. The Supreme Court was not wrong to recognize the claims of secular creeds that “play the role of a religion and function as a religion in . . . life.”⁸⁶ Neither was it wrong to see religion as the paradigm for such claims.

My argument pivots on the phenomenon of individuals who believe themselves to be commanded by authorities other than political authority, generating conflicting laws and loyalties. This experience has nothing to do with “unimpaired flourishing,” as Eisgruber and Sager would have it.⁸⁷ Religion is not always about human development or fulfillment. Nor is that the right way of understanding claims for exemption from civil obligations such as military service. Few people regard such service as promoting their flourishing *ex ante*, and even fewer *ex post*. If impeding individual development or fulfillment were a valid and sufficient reason for accommodations, Scalia’s fears would become real.⁸⁸

Similar considerations explain why Eisgruber and Sager’s hypothetical “Collar,” an army officer with a rare skin condition that prevents him from wearing a tie,⁸⁹ is not on all fours with the real yarmulke-wearing Goldman.⁹⁰ No one is commanding Collar not to wear a tie; it is a physical necessity. But the military has always established physical and medical requirements for service, and Collar no longer meets them. So when Eisgruber and Sager ask, quasi-rhetorically, whether we should regard Goldman’s interests as more weighty than Collar’s,⁹¹ one answer is a straightforward yes. A complementary response is that to speak of Goldman’s claim as interest-based is to make a category mistake. Honoring a command is not an interest.

84. See, e.g., NECHAMA TEC, WHEN LIGHT PIERCED THE DARKNESS 162 (1986).

85. See SAMUEL P. OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE 155 (1988).

86. Welsh v. United States, 398 U.S. 333, 339 (1970) (plurality opinion).

87. See Eisgruber & Sager, *supra* note 27, at 1254–56.

88. See generally Emp’t Div. v. Smith, 494 U.S. 872, 888–90 (1990) (stating that the adoption of such a system would be “courting anarchy”).

89. See Eisgruber & Sager, *supra* note 27, at 1264–65.

90. See Goldman v. Weinberger, 475 U.S. 503, 504 (1986).

91. Eisgruber & Sager, *supra* note 27, at 1265.

None of this is to say that expanded accommodation is unproblematic. Religions typically identify the source of the command and specify the content of the command in ways that can be verified. When Quakers say that they cannot engage in armed conflict,⁹² or Jehovah's Witnesses that they cannot worship idols,⁹³ they can point to the core texts and settled practices of their faith as proof. Religion offers conscience a measure of public objectification. Individualized claims of conscience detached from religion are harder to assess. That does not mean that they should be dismissed outright.

Still, inquiries into such claims are bound to be risky and intrusive. The external indicia of sincerity are less than reliable. And if courts try to reason from the credibility of belief to the sincerity of the believer, many religions would fail the test. By definition, all miracles defy the laws of nature, and it is hard to see what makes one purported miracle more or less credible than the next. Surely courts cannot "grandfather" religions whose miracles have been long and widely accepted while subjecting newer faiths to stricter scrutiny.

What of the fears (going back to Hobbes) that recognizing claims of conscience makes societies ungovernable? Won't extending these claims to include some secular beliefs deepen the danger? In *Smith*, Justice Scalia rejected an exemption from drug laws for peyote used in Native American religious rituals on the ground that granting this claim would create a system "in which each conscience is a law unto itself."⁹⁴ It was not the expansive concept of conscience that worried Scalia; it was the core meaning—"actions thought to be religiously commanded."⁹⁵ The more religiously diverse the society, the more such actions there will be, covering an ever greater sphere of social life and public law. A society that treats accommodation as a basic right would be "courting anarchy."⁹⁶

My response is simple: in the real world, claims of conscience have not had, and will not have, the consequences the objectors fear. The law is capable of establishing templates to distinguish between real and spurious claims, and courts and agencies are capable of applying them. Even when the stakes are very high, as they are in wars of total mobilization, authorities

92. See Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 946 n.22.

93. *Exodus* 20:4.

94. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

95. *Id.* at 888.

96. *Id.*

are able to accommodate conscientious claims without undermining military effectiveness. Consistent with specific accommodations, states may legitimately require those receiving them to perform alternative services that compensate for whatever burden may have been shifted to others. And given the risks and costs of seeking accommodations—the time and money needed to meet strict tests, plus the likelihood of social disapproval—it is no wonder that relatively few people choose to run the gauntlet. This is not anarchy, unless every limit to state authority implies anarchy, in which case liberal democracy is by definition anarchic.

V. CONCLUSION

To assert, as I have, that similar cases should be treated similarly is not to specify how we should treat them. In his *Welsh* concurrence, Justice Harlan states that “the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group.”⁹⁷ But once the state has chosen to do so, he continues, it is not free to treat like cases differently. Not only can the state not distinguish among types of religions, but also it cannot distinguish between religious and nonreligious claims without running afoul of the Establishment Clause.⁹⁸ That is what section 6(j) of the draft law did, and why Harlan thought he had no choice but to find that portion of the law unconstitutional.⁹⁹

As he observes, there are two ways of resolving the constitutional infirmity: accommodation must either be extended to nonreligious beliefs with commanding force or be withdrawn from religious beliefs.¹⁰⁰ But the latter course would uproot unnecessarily a tradition going back farther than the Founding era.¹⁰¹ Extending the perimeter of accommodation honors both tradition and the rule of law.

That is one way of reaching what I have argued is the right result. The other, which is preferable, is to understand granting conscientious objector status to believers is more than an arbitrary or convenient tradition. It is rather a concrete recognition of the clash of authorities that Madison describes in *Memorial and Remonstrance Against Religious Assessments*.¹⁰² By acknowledging that nonpolitical claims can restrict the legitimate scope of state authority, we honor the principle of limited government that stands at the heart of liberal democracy. The claims of religion over

97. *Welsh v. United States*, 398 U.S. 333, 358 n.9 (1970) (Harlan, J., concurring).

98. *Id.* at 356–59.

99. *Id.* at 356.

100. *Id.* at 361.

101. *See id.* at 356.

102. *See* MADISON, *supra* note 24.

against the state turn out to be the entering wedge for a wider class of such claims. That these claims plausibly can invoke an authority that restricts public power is what makes them worthy of special respect from a normative as well as constitutional point of view.

